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No. 10-243

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SONNENSCHEIN NATH & ROSENTHAL LLP,

Petitioner,

v.

DOUGLAS E. ROSENTHAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF CERTAIN LARGE LAW FIRMS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Amici Curiae are a group of large law firms (the "Amicus Group") who use non-formulaic criteria to set compensation for their firms' owners, variously designated as partners (or equity partners), principals, shareholders, and similar designations.[1] The Amicus Group is comprised of the following firms: Baker & McKenzie LLP, Best Best & Krieger LLP, Cooley LLP, DLA Piper LLP (US), Dykema Gossett PLLC, Locke Lord Bissell & Liddell LLP, Mayer Brown LLP, Perkins Coie LLP, Reed Smith LLP, Schiff Hardin LLP, and Zuckerman Spaeder LLP. The firms range in size from approximately 75 attorneys to more than 3,700. Ten of the 11 firms have offices in the District of Columbia. And several are chartered or incorporated in Delaware.

The Amicus Group is aware of the decision of the District of Columbia Court of Appeals, which endorsed the jury's nullification (under the doctrine of good faith and fair dealing) of the Petitioner's compensation decision for the Respondent and which affirmed the jury's award in the form of civil damages of the amount to which the Respondent contended he was entitled. For the reasons discussed below, the firms in the Amicus

1. Pursuant to Rule 37.2(a), Amici Curiae state that counsel of record received timely notice of the intent to file this brief and that all parties have consented to its filing. Pursuant to Rule 37.6, the Amici Curiae state that no counsel for a party authored this brief in whole or in part nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No one other than the Amicus Group, its members, and its counsel made such a monetary contribution.

Group are deeply concerned about the uncertainty created by and adverse impact on key management decisions of the nation's leading firms, most of which have offices in the District of Columbia, many of which are incorporated or charted in Delaware, and most of which have adopted discretionary, non-formulaic compensation systems with characteristics substantially similar to the Petitioner's.

REASONS FOR GRANTING REVIEW

I. The successful contractual, non-formulaic model of large firm partner compensation is threatened by the jury model applied below.

Firms in the Amicus Group have adopted non-formulaic compensation systems via contract (partnership agreements or their equivalent), vesting broad discretion in select committees of their colleagues to recommend (subject to approval by the respective partnerships) or to set (with no further review) the appropriate allocation of profits for designated periods (typically one or two years). While the use of non-formulaic criteria is by no means the only way to divide profits (e.g., some firms proceed on a lock-step basis that graduates compensation with years of service), it is the predominant method adopted by the nation's largest law firms. *See,* Pet. at 16 n.17. Firms such as those in the Amicus Group have exercised their judgment to adopt a non-formulaic compensation system, consistent with firm culture, that best achieves their goals of attracting and retaining talent and providing the highest quality of professional service to their clients. Indeed, they believe that they risk the

loss of talent absent this method of evaluating and rewarding it.

There exists, not surprisingly, a consensus among law firm managers and their partners that the processes of recommending and setting compensation in a non-formulaic system are among the most difficult decisions they make. Compensation committees do not operate with perfect information. The division of profits is a zero-sum game. Whether the committee makes recommendations (as in some firms, like Petitioner's) or whether it makes the ultimate decision concerning partner compensation (as in other firms), the results are necessarily a compromise, allocating a fixed resource among many diverse stakeholders. And as with any compromise among five, a dozen, or hundreds of individuals, there will inevitably be those who are disappointed that their own compensation is too low or that others' compensation is too high. Indeed, that is true even when the disappointed can nonetheless count themselves among the financially fortunate, compared to the vast majority of practicing attorneys (much less the public at large).

Firms using non-formulaic compensation systems do not survive because of inertia or indifference. Rather, if they survive and prosper it is because the respective partnerships recognize that, having entrusted the recommendations or decisions to the committee, the committee has acted with integrity, striving to ensure that its actions meet the test of relative fairness across the partnership. For if the ultimate decisions are not perceived as relatively fair by the shareholders, the glue that holds the firm together will dissolve and the firm

will risk failure. And that requirement of fairness for survival is a far more effective, not to mention lawful, guarantor of fair decision-making than the specter of jury nullification.

Of course, a decision perceived as fair even by the vast majority of a firm's shareholders will not advance the firm's interests unless it is also final. Finality — in setting compensation, as with other business decisions — is as important to the nation's large law firms as it is to any other business.

Having agreed to be bound, by contract, to non-formulaic compensation systems, the partners in these firms would be highly unlikely to have realized that they had agreed — implicitly or otherwise — to have a lay jury review and revise the compensation committee's recommendations or decisions, resetting the compensation of disappointed partners in the form of civil damages. But that is precisely the procedure fashioned by the courts below and imposed on the Petitioner. Indeed, the jury was permitted not only to adjust the Respondent's compensation by deciding the "fair" weight to give his assigned collections, it was also allowed to *reset* the proper amount of those collections by reallocating billing credit within the firm for other matters.

Permitting a jury to reset an individual partner's compensation under a good faith and fair dealing standard directly impairs a contractual non-formulaic compensation system by stripping it of the very flexibility that gives it value. Indeed, it permits the disappointed to wait until the committee has done the

heavy lifting and then asks a lay jury to serve as a quasi-appellate court. No firm in this country would design such a system. And no partnership would agree to it.

II. The holding below presents an "exceptional situation where egregious error has been committed."

As the Petition makes clear, review of decisions of the District of Columbia Court of Appeals may be appropriate "'in exceptional situations where egregious error has been committed.'" Pet. at 8, *quoting Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (internal citations omitted). The Amicus Group agrees that, for the reasons stated in the Petition, this is such a case.

First, the decision below violates the most fundamental principle of contract law — that the parties' intent should govern. The parties in this case plainly intended to vest discretion for making compensation recommendations in the compensation committee, not juries.[2]

Second, the lower court's basis for ignoring the parties' intent — an application of the implied covenant of good faith and fair dealing — is entirely unsupportable in this case. Delaware law is clear that the covenant does not apply when the situation under challenge (here, compensation setting) is governed by contract. *See* Pet. at 12. The firms in the Amicus Group, the majority of whom have offices in the District of

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2. And partners in some of the firms in the Amici Group, and nationwide, have vested the ultimate decision concerning compensation in their respective committees.

Columbia and many of whom are charted or incorporated in Delaware, have serious concern about the potential broad reach of the lower court's decision.

The lower court offered no reason why law firms with non-formulaic compensation systems must live by a different set of rules than other law firms and other businesses. Nowhere else does an entity governed by Delaware law face a jury's review of discretionary decisions specifically permitted or required by contract. On the other hand, should the rulings below remain intact, any trial judge in the District of Columbia or, indeed, any judge dealing with a contract governed by Delaware law, may point to this precedent to justify sending to a jury a result covered by that contract but perceived by that judge, for whatever reason, to be "unfair." Such a precedent may be undone only by this Court, and should be.

CONCLUSION

Because the decision below is contrary to the contractual provisions that govern partner compensation in many large law firms and because it is so fundamentally at odds with common practice, common sense, and the law of contracts, the Amicus Group urges the Court to grant review.

Respectfully submitted,

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